No. 83-5424

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GLEN BURTON AKE, *Petitioner*,

v.

STATE OF OKLAHOMA, *Respondent*.

On Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

REPLY BRIEF FOR THE PETITIONER

ARTHUR B. SPITZER
Counsel of Record
ELIZABETH SYMONDS
American Civil Liberties Union Fund of the National Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076
CHARLES S. SIMS
BURT NEUBORNE
American Civil Liberties Union Foundation, Inc.
132 West 43rd Street
New York, N.Y. 10036
DEBORAH J. STAVILLE
10 West 15th Street
New York, N.Y. 10011

Of Counsel:
WILLIAM B. ROGERS
ACLU of Oklahoma Foundation
P.O. Box 799
Oklahoma City, OK 73101

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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I. OKLAHOMA'S REFUSAL TO PROVIDE PETITIONER WITH A PSYCHIATRIC EXAMINATION DEPRIVED HIM OF A FAIR TRIAL

A. The Law of Oklahoma Flatly Rejects Any Right to Expert Assistance for Indigent Defendants

The Attorney General of Oklahoma, in his submission to this Court, has conceded the existence of the constitutional right for which petitioner contends:

> The State concedes that there may be cases in which the denial of funds to conduct examinations or tests requiring expert witnesses would render the trial so fundamentally unfair as to deny due process. *Obviously*, a state may take some action or refuse to provide an indigent access to a defense which constitutes such a denial.

R. Br. 45 (emphasis added).[1] We agree with the Attorney General that this is "obvious." *But the courts of Oklahoma deny the existence of any such right.* As the Court of Criminal Appeals reiterated in this case:

> We have held numerous times that the unique nature of capital crimes notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes.

Ake v. *State*, 633 P.2d 1,6 (Okla. Crim. App. 1983), J.A. 71. The Attorney General argues—incorrectly, as we show below—that petitioner was not entitled to a psychiatric examination or assistance because his sanity was not seriously in issue. But in Oklahoma, a defendant's need for expert assistance is quite irrelevant; such assistance is available in *no* case. The Court of Criminal Appeals has explained:

> [S]tate legislators could appropriately provide impecunious defendants with this [expert] aid if

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[1] "R. Br. ____" indicates references to respondent's brief in this Court.

> deemed practical and in the public interest. In the absence of enabling legislation, we know of no judicial precedent, *constitutional mandate*, or statutory authority in Oklahoma obligating this state, at its expense, to make available to the appellant, in addition to counsel, the full paraphernalia of defense.

Maghe v. *State*, 620 P.2d 433, 435 (Okla. Crim. App. 1980) (emphasis added). Psychiatric and other assistance has repeatedly been denied on this ground, without regard to the facts of the particular case before the court. *See, e.g.*, *Cox* v. *State*, 644 P.2d 1077 (Okla. Crim. App. 1982); *Dennis* v. *State*, 561 P.2d 88,98 (Okla. Crim. App. 1977).

Although the Oklahoma legislature has provided funds to pay the prosecution's experts, *see* Okla. Stat. tit. 20 § 1304(b)(3), it has provided no funds for defense experts. Respondent has not cited a single case, on any facts, in which the Court of Criminal Appeals has found expert assistance necessary for an indigent defendant. Oklahoma uniformly refuses to provide such assistance, even when the need is recognized. *See* Brief Amici Curiae of the Public Defender of Oklahoma County, *et al.*, at 4-9 and Appendices A and B thereto.

The remarks of the trial judge in a recent case sum up the state of the law in Oklahoma. The defendant had moved for a psychological evaluation. The judge replied:

> [Y]ou can't hire investigators and you can't hire experts . . . I think you're right on the law. . . . I know you're right.
>
> But the trouble of it is, there's three fellows out there on the State Capitol [i.e. the Court of Criminal Appeals] that say that that's not the law. And you took it out there and they overruled you—and they overruled me, not you. And I think they're flirting with dynamite.
>
> . . .

> I cannot legally give you those funds. And what the Supreme Court of the United States is going to say about it one of these days is another ball game. But I can't do that. And the Court of Criminal Appeals told me that you can't do this. I've got to follow them.
>
> . . .
>
> You've got to convince them out there. That's who you've got to convince.
>
> [Defense Counsel]: I've tried.
>
> The Court: Take it on up to the Supreme Court of the United States.

State v. *Johnson*, No. CRF-81-4939 (Okla. Cty. Dist. Ct., hearing of Jan. 28, 1982) (transcript excerpts printed in Appendix B to Brief Amici Curiae of the Public Defender of Oklahoma County, *et al.*).

The trial judge in the instant case confirmed that it was the unyielding law of Oklahoma, and not the facts before him, that compelled denial of petitioner's motion for a psychiatric examination. Acknowledging the relevancy and materiality of such an examination, the court agreed that Ake was entitled to one and ordered him to be made available for one "if you [defense counsel] are able to arrange it." J.A. 21. But, openly characterizing the law of Oklahoma as "almost cripplingly restrictive" in this respect, the court stated that it "could not even consider" granting the motion for a psychiatric examination at State expense. J.A. 20, 21. The Court of Criminal Appeals rejected Ake's appeal on this issue *as a matter of law*, without any discussion of the facts to determine whether a psychiatric examination had been necessary in this case. *Ake* v. *State*, 663 P.2d at 6, J.A. 71.

That is the judgment which is here for review. The Attorney General's acknowledgement that a state-funded defense expert may be constitutionally required

in some cases is nothing less than a confession that the contrary law of Oklahoma, which was applied in this case, is constitutionally infirm.

B. Petitioner's Sanity Was Seriously In Issue

The State argues that Ake was not entitled to a psychiatric examination directed to his mental condition at the time of the crime because his sanity was not seriously in issue. R. Br. 20, 44. The record shows the contrary.

In Oklahoma, a defendant's mental condition is in issue if the defendant raises a reasonable doubt about his sanity at the time of the crime. *Ake* v. *State*, 663 P.2d at 10, J.A. 78.

At trial, two psychiatrists and a physician testified that when they examined Ake—between four and six months after the crime—he was seriously ill, with a diagnosis of chronic paranoid schizophrenia. J.A. 33, 35 (Dr. Allan); 42 (Dr. Enos); 49, 52 (Dr. Garcia). The doctors testified that their diagnoses were based on the criteria contained in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. J.A. 43, 45 (Dr. Enos); Tr. 565 (Dr. Allan).[2] Under those criteria, a diagnosis of schizophrenia requires "[c]ontinuous signs of the illness for at least six months," and a diagnosis of chronic schizophrenia requires more or less continuous signs of illness during a period of "greater than two years." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 189, 192 (3rd ed. 1980).[3]

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[2] "Tr. ____" indicates references to the trial transcript.

[3] These prerequsites for the diagnosis of schizophrenia were not called to the attention of the jury, apparently because defense counsel were not familiar with them—a concrete example of how the pre-trial assistance of a mental health expert could materially have assisted in the presentation of the defense case. By contrast, the prosecutor was apparently quite familiar with the *Diagnostic and Statistical Manual*. *See, e.g.*, Tr. 565, 576, 581. However, he did not mention the six month durational requirement for the diagnosis of schizophrenia. Rather, he argued to the jury, as the State now argues in this Court, that there was *no* evidence that Ake was mentally ill at the time of the crime. J.A. 55. *Cf. Brady* v. *Maryland*, 373 U.S. 83 (1963).

Even without other evidence, these diagnostic criteria raised a reasonable doubt of Ake's sanity at the time of the crime. But there was substantial additional evidence. Dr. Allan testified that Ake's mental illness might well have begun in childhood, and he specifically noted the possibility that Ake's illness may have been "apparent" at the time of the crime. J.A. 38. And Dr. Garcia, the State's Chief Forensic Psychiatrist, testitifed that a person with Ake's diagnosis who had been using drugs and alcohol (as Ake had been on the day of the crime), might not have been able to tell right from wrong. J.A. 54.

Of course, direct testimony by a psychiatrist who had examined Ake with respect to his condition at the time of the crime would have been more conclusive. But the absence of such testimony was the unavoidable result of the State's refusal to provide Ake with the means to obtain *any* professional examination on that issue.

The State points to several facts that, it claims, prove Ake's sanity at the time of the crime. But these contentions disclose only that the State labors under several serious misconceptions about the nature of mental illness—misconceptions that the jury is likely to have shared.

Respondent asserts, first, that Ake "exhibited no signs of mental illness" at the time of the crime because he acted rationally and spoke coherently. R. Br. 20-21. Respondent seems to be of the view that a person must look or act "crazy" to be mentally ill. This is not the case. *See, e.g.*,

Bemporad & Pinsker, *Schizophrenia: The Manifest Symptomatology* in 3 *American Handbook of Psychiatry* 525, 539 (S. Arieti 2d ed. 1974) (paranoid schizophrenics often show "no gross evidence of thought process disturbance"); I. Weiner, *Psychodiagnosis in Schizophrenia* 304 (1966) (in paranoid schizophrenia, "intellectual functioning is relatively preserved"). As the Court of Appeals for the Eleventh Circuit recently explained:

> Insanity is a broad term covering a variety of mental and emotional diseases. The level of lucidity under which an insane person operates and the symptoms displayed may vary with time. A person's apparent level of comprehension may not always correspond to his level of sanity at the time. . . .
>
> Paranoid schizophrenics are often quiet. They are also often capable of spawning complex, rational plans of action, even though they are operating under delusions.

Greenfield v. *Wainwright*, 741 F.2d 329, 333 (11th Cir. 1984).[4]

Second, respondent claims that Ake's detailed statement recalling the events of the day in question "refutes any claim that Ake was delusional at the time of the murders." R. Br. 22. Again, this displays a serious misunderstanding of the nature of schizophrenia. Schizophrenic persons may later remember clearly and in great detail their thoughts and actions while in a psychotic state. Some have even written books about their experiences

[4] In any event, respondent's contention that "[n]othing in the conduct of the crime . . . gives the slightest indication" of insanity (R. Br. 20) is not altogether accurate. For example, as respondent recites in its brief, Ake "remarked to the family that *he liked to shoot people*. . . . He kept talking about shooting people *and how there was nothing wrong with it*." R. Br. 7 (citing Tr. 439-440) (emphasis added). Yet Ake had no prior record of violent behavior. *See* Report of the Trial Judge, at 5.

while mentally ill. *See, e.g.*, Renée [pseudonym], *Autobiography of a Schizophrenic Girl* (1951); M. Vonnegut, *The Eden Express* (1975).

Third, respondent notes that lay testimony is admissible on the issue of a defendant's sanity, R. Br. 28, and suggests that the failure to call as witnesses Ake's relatives and others who saw him earlier on the day of the crime somehow proves that Ake was sane or that his sanity was not in issue. R. Br. 28-32. But the absence of such testimony cannot negate the reasonable doubt that is independently present in this record.[5] Moreover, lay observers may not be able to appreciate the symptoms of schizophrenia. As noted above, a paranoid schizophrenic may act in an apparently rational manner much of the time:

> The onset often is so subtle and slow that the illness imperceptibly unfolds over a period of many months or years. The patient's withdrawal from interpersonal relationships and the appearance of other schizophrenic symptoms are so gradual that people around the patient may not be aware of his illness until it is far advanced.

A. Chapman, *Textbook of Clinical Psychiatry* 265 (2d ed. 1974). Yet full-blown psychosis may begin abruptly and

[5] The Oklahoma courts may admit lay testimony, but they treat it as inadequate to raise even a reasonable doubt about a defendant's sanity. Thus, in *High* v. *State*, 401 P.2d 189 (Okla. Crim. App. 1965), the testimony of a non-psychiatrist physician that the defendant could have "blacked out" during the crime was held inadequate to raise any doubt about defendant's sanity. *Id.* at 195. The court revealed its awareness of the necessity of psychiatric testimony on this issue when it noted that, by contrast, the testimony of a psychiatrist "could have raised the question of insanity." *Id.* Similarly, in *Wilson* v. *State*, 568 P.2d 1279 (Okla. Crim. App. 1977), the testimony of two deputy sheriffs that the defendant was "not a normal person" was held to have raised "no reasonable doubt of defendant's sanity." *Id.* at 1280-81.

"may be accompanied by belligerence, combativeness and destructiveness." *Id.*

Indeed, the events in Ake's life immediately preceding the killings involved in this case are strikingly consistent with the sudden onset of an acute psychotic episode. The morning of the crime, Ake discovered that his wife or girlfriend (the nature of their relationship is not clear from the record) had left him and was sleeping with someone else. R. Br. App. 3a. He spent much of that day in a futile search for her. R. Br. App. 3a, 11a, 23a. Beginning early that morning, he started drinking heavily and taking a variety of drugs, including both marijuana and cocaine. R. Br. App. 3a, 4a, 12a, 13a. These events may well have combined to trigger an acute exacerbation that could not have been observed by those who saw Ake early in the day because it may not yet have developed.

"Acute onset [of schizophrenia] is triggered by an event with critical intrapsychic meaning for the patient. In our experience, this catalyst is most often a loss, especially that of a person to whom the patient has been close and with whom he has a mutually dependent relationship. . . . When onset is acute, the patient is faced with three alternatives for dealing with his unbearable pain: homicide, suicide, or psychosis." Day & Semrad, *Schizophrenic Reactions*, in *The Harvard Guide to Modern Psychiatry* 199, 220 (A. Nicholi ed. 1978).

Excessive alcohol and drug use are similarly recognized as causes of acute exacerbation: "Cannabis [marijuana] may precipitate psychotic reactions in people with schizophrenia. . . . Individuals with psychopathology appear to be at greater risk for the development of psychosis consequent to amphetamine or cocaine use." Jones, *Mental Illness and Drugs* in *Drugs and Psychopathology* 126 (G. Austin *et al.* eds. 1977). "There seems to be reason to believe that if a certain type of personality takes large

quantities of alcohol over a considerable period of time, a psychogenic reaction of an acute schizophrenic nature may be liberated." L. Kolb & K. Brodie, *Modern Clinical Psychiatry* 634 (10th ed. 1982).[6]

Naturally, these library references cannot prove that Ake was suffering an acute schizophrenic episode at the time of the crime. But they do demonstrate the necessity of a professional examination to determine Ake's condition at that time—the examination Ake requested and was denied. They also demonstrate that the State's suppositions about mental illness—that it is incompatible with outwardly rational conduct, that it is incompatible with a clear recollection of events, and that its existence is necessarily apparent to lay observers—are strikingly fallacious. Nothing could demonstrate more forcefully the necessity of expert assistance, for the jurors (and perhaps even defense counsel) may have held the same "common sense" but false beliefs about mental illness, beliefs that could have been corrected both in general and, perhaps, with respect to Ake in particular, if expert psychiatric or psychological assistance had been available to the defense.

Finally, respondent suggests that Ake's symptoms of mental illness were probably "staged" in a calculated attempt to establish a counterfeit insanity defense. R. Br. 27-28. Not only was this suggestion positively and emphatically rejected by the State's own Chief Forensic Psychiatrist, *see* J.A. 48, 51, but it is physiologically

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[6] Respondent also suggests that Ake's apparently rational behavior during the weeks after the killings negates any possibility of insanity. R. Br. 23-24. But schizophrenia may be "characterized by periods of crisis accompanied by acute psychotic symptoms, interspersed with periods of partial or complete remission." G. Stimmel, *Schizophrenia*, in *Clinical Pharmacy and Therapeutics* 555, 558 (Herfindel & Hirschman 2d ed. 1979).

incompatible with the fact that Ake was being administered 600 mgs.Thorazine per day prior to and during his trial. If Ake had not been truly suffering from serious mental illness at that time, it is doubtful that he could have remained awake under such medication. *See* T. DuQuesne & J. Reeves, *A Handbook of Psychoactive Medicine* 356 (1982) (Thorazine gives "normal" subjects an "irresistible urge to sleep"); Hawkins, *et al.*, *A Multivariant Psychopharmacologic Study in Normals*, 23 *Psychosomatic Medicine* 1 (1961) (25 mg. doses of Thorazine caused sedation, dysphoria and mental clouding in normal volunteers).

In sum, respondent has failed to present any credible rebuttal to the showing that Ake's mental condition at the time of the crime was seriously in issue, and that he required psychiatric assistance to develop and present his insanity defense.[7]

C. Expert Assistance Is A Necessity When Sanity Is In Issue

Having conceded the existence of a constitutional right to necessary expert assistance, respondent nevertheless resists its implementation.

1. Respondent attempts to distinguish *Little* v. *Streeter*, 452 U.S. 1 (1981) on two grounds: (a) the "unfair evidentiary burden" placed upon the putative father in

[7] The State argues, as it did in its opposition to certiorari, that Ake waived his right to seek review on this issue by failing to raise it in his motion for a new trial, which was filed in the trial court one day after the jury's verdict. R. Br. 47-49. This contention is without merit. The Oklahoma Court of Criminal Appeals considered and rejected this federal claim on its merits. *Ake* v. *State*, 633 P.2d at 6, J.A. 71. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *see also Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974).

Little because his testimony, alone, was insufficient to overcome the mother's prima facie case, and (b) the high degree of scientific reliability of blood tests. R. Br. 37-38. These distinctions do not distinguish. In Oklahoma, *the burden is on the defendant* to raise by evidence a reasonable doubt about his sanity at the time of the crime.[8] As shown above (n. 5), this appears to be a practical impossibility without psychiatric testimony. And while blood testing is a more exact science than psychiatry, psychiatric diagnosis is in fact highly reliable, with diagnostic concurrence among psychiatrists exceeding 80%. *See* Nat'l Mental Health Ass'n, *Myths and Realities: A Report of the National Commission on the Insanity Defense* 24 (1983). Like blood testing, expert psychiatric diagnosis is essential because there is no adequate evidentiary substitute: "Absent such an examination, it is virtually inconceivable that the insanity claim will be given a fair hearing." Brief Amicus Curiae of the American Psychiatric Ass'n, at 7. As Justice Powell has observed, a defendant whose case turns on a mental health issue might be better off with a psychiatrist than with a lawyer, if he could have only one person to assist his defense. *Vitek* v. *Jones*, 445 U.S. 480, 500 (1980) (Powell, J., concurring).

The necessity of expert assistance in cases where sanity is in issue was recognized by the American Bar Associ-

[8] Respondent's assertion that "[t]he instructions given to the jury placed upon the state the burden of proving beyond a reasonable doubt that Ake was sane at the time of the commission of the crime," R. Br. 38, is simply untrue. The jury was charged:

> *the burden of proof is on the defendant* to raise in the minds of the jury a reasonable doubt of the defendant's sanity at the time of the commission of the acts in question.

J.A. 58 (emphasis added). The Court of Criminal Appeals held that Ake had "failed to establish any reasonable doubt as to his sanity," and that the burden of proof on that issue had therefore never shifted to the prosecution. *Ake* v. *State*, 663 P.2d at 10, J.A. 78.

ation this year, when it formally adopted a comprehensive set of Criminal Justice Mental Health Standards. Standard 7-3.3 provides that in such cases

> each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified . . . professional selected by the defendant in any case involving a defendant financially unable to afford such an evaluation.

ABA Criminal Justice Mental Health Standards 86 (1984). This right is recognized to be grounded in the Sixth Amendment right to effective assistance of counsel. *Id.* at 87 (Commentary to Standard 7-3.3). As the Commentary notes, an expert "not only provides testimony that is *necessary* at trial to support the defense of mental nonresponsibility, but also 'attunes the lay attorney to unfamiliar but central medical concepts and enables him . . . to probe intelligently the foundations of adverse testimony.' " *Id.* at 88 (emphasis added), quoting *United States* v. *Taylor*, 437 F.2d 371, 377 n.9 (4th Cir. 1971) (Haynesworth, C.J.).[9]

2. Predictably, Oklahoma raises the specter of a "staggering" new fiscal burden upon the States if a constitutional right to necessary expert assistance is recognized. R. Br. 47. This fear is demonstrably illusory. As noted in our main brief, the federal courts and most states already provide such assistance. The evidence shows that

[9] A copy of the complete *ABA Criminal Justice Mental Health Standards* with accompanying Commentary has been lodged with the Clerk and served upon respondent's counsel. Copies were also transmitted to the Chambers of all Justices on September 7, 1984, by Chief Justice William H. Erickson of the Colorado Supreme Court in his capacity as Chairman of the ABA Standing Committee on Association Standards for Criminal Justice. The full texts of the relevant black-letter standards are set out in an Appendix to this brief.

the cost is not burdensome.[10] Under the federal Criminal Justice Act, only $196,823 was expended nationwide for psychiatric and psychological experts, and only $832,305 for *all* expert services, in fiscal year 1983. In States bordering Oklahoma, expenditures have been similarly modest:

Kansas	$53,995	(all experts and investigators)
Missouri	$26,179	(all experts and investigators)
New Mexico	$129,000	(all experts)
Colorado	$230,943	(all defense *and prosecution* experts)

Expenses for expert assistance for indigent defendants in other States are of the same order:

Hawaii	$42,000	(all experts)
Massachusetts	$300,000	(all experts *and* all indigents' expenses in all civil cases)
New Jersey	$428,252	(all experts)
New York	$1,209,183	(all experts and investigators)[11]
Rhode Island	$3,247	(psychiatrists and psychologists)
Vermont	$18,292	(all experts)
Wisconsin	$142,700	(all experts)
Wyoming	$63,000	(all experts)

It is thus simply not the case that providing necessary expert services to indigent defendants will place an undue

[10] The following data were obtained from the Administrative Office of United States Courts and from state public defender offices. Copies of the relevant documents have been lodged with the Clerk and served upon respondent's counsel. The data shown are for each jurisdiction's most recent available fiscal year.

[11] A study of expenses in 1978 in New York (Manhattan) and Bronx Counties indicated that investigators accounted for about 70% of total expenses, and psychiatrists and psychologists for about 20%.

strain on the Oklahoma State treasury.[12] In fact, there may well be a net savings, since it can be anticipated that an expert evaluation will often result in the dismissal of criminal charges or in a successful plea bargain in a case that would otherwise have gone to trial. Nationally, "the vast majority of insanity defense cases . . . are resolved through plea bargaining" after a psychiatric examination establishes the defendant's mental condition at the time of the crime. Nat'l Mental Health Ass'n, *Myths and Realities: A Report of the National Commission on the Insanity Defense* 23 (1983).

3. Respondent's assertion that reversal here would "open a pandora's box" of prisoner litigation, R. Br. 46, is similarly unfounded. No such litigation could ensue in the many jurisdictions where necessary expert assistance has already been available.[13] In those few States where it has not been available, an applicant for post-conviction relief would still bear the burden of showing that he had made an adequate pre-trial demonstration of his need for expert assistance.[14] To reiterate, we do not assert a right

[12] For fiscal year 1984, Oklahoma appropriated more than $13 million for District Attorneys' offices, including $312,000 for "Victim-Witness Coordinators." *See* Okla. Stat. tit. 74 § 285(15) note (Supp. 1983).

[13] Thirty-two jurisdictions were listed in the main brief. Further research indicates that at least three other States provide for psychiatric assistance to indigent defendants in insanity defense cases. *See* Del. Ct. of Common Pleas Crim. R. 44(e) (1981); Ohio Rev. Code Ann. § 2945.39 (Page 1982 Repl. Vol.); Utah Code Ann. § 77-14-4 (1982 Repl. Vol. & Supp. 1983). Virtually all States provide for at least *some* psychiatric examination of a defendant whose plea is insanity. *See* B. Sales, *et. al.*, *Disabled Persons and the Law* 705-08 (1982) (collecting statutes).

[14] *Compare Caldwell* v. *State*, 443 So.2d 806, 812 (Miss. 1984) (defendant's request for psychiatric examination granted; denial of request for ballistics and footprint experts affirmed on ground that no showing of need had been made), *cert. granted sub nom. Caldwell* v. *Mississippi*, No. 83-6607 (Oct. 9, 1984).

to expert assistance "on demand." *See* Pet. Br. at 37 n.22; *see also, e.g.*, *United States* v. *Chavis*, 476 F.2d 1137, *on rehearing*, 486 F.2d 1290 (D.C. Cir. 1973) (Wilkey, J.) (discussing criteria for right to psychiatric examination).[15]

* * *

What Oklahoma has done here is to place upon the defendant the burden of establishing a reasonable doubt as to sanity, set the threshold for such doubt so high that it can be crossed only by presenting direct psychiatric testimony on the question, and then refuse to provide indigent defendants with the means of obtaining such testimony. Such a practice cannot be squared with the minimum demands of due process.

II. OKLAHOMA'S REFUSAL TO PROVIDE PETITIONER WITH EXPERT ASSISTANCE DEPRIVED HIM OF A FAIR SENTENCING PROCEEDING

A. Oklahoma does not dispute the importance, at a capital sentencing proceeding, of testimony about a defendant's mental condition at the time of the crime. Indeed, the State volunteers that "virtually every murderer suffers from some degree of mental disability or personality disorder." R. Br. 52. But, it maintains, Ake's poverty-based inability to present expert testimony about his mental condition at the time of the crime to the jury in mitigation of punishment provides no grounds for reversal.

Respondent suggests three reasons for this conclusion: that Ake could have called lay witnesses, that he could

[15] *Amicus* American Psychological Association suggests that this Court need only decide here that a defendant raising an insanity defense *in a capital case* has a right to *some* expert examination. Should the Court follow amicus' suggestion, the impact of its ruling would be even more attenuated.

have testified himself, and that the State has no obligation "to create exculpatory evidence." R. Br. 50-52.

As noted above, however, lay witnesses cannot necessarily be expected to perceive or understand, much less explain to a jury, the etiology, symptomatology, and nature of mental illness. And there were no lay witnesses (except the two surviving victims and Ake's co-defendant) to Ake's behavior at the time of the crime. Nor was Ake capable of testifying in his own behalf; he was unable even to communicate with his attorneys. *See* Pet. Br. 9-10; *Ake* v. *State*, 663 P.2d at 6, 7 n.5, J.A. 71, 73. When these circumstances are considered together with the strong evidence that Ake was in an acute schizophrenic episode at the time of the crime, the State's position amounts to an assertion that, with respect to indigent defendants, the State has no interest in assuring that the jury hears relevant and material mitigating evidence before it decides between life and death. But this Court has stressed that a consideration of the personal characteristics of the offender is not just a permissible but a "constitutionally indispensable part of the process of inflicting the penalty of death." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982); *accord*, *Barefoot* v. *Estelle*, 103 S. Ct. 3383, 3396 (1983).[16]

B. Respondent does not deny that the prosecution relied on psychiatric testimony to condemn Ake to death based on an "expert" prediction of future dangerousness. *See* Pet. Br. at 12; Tr. 714, 717.[17] Indeed, the State makes

[16] The ABA Criminal Justice Mental Health Standards also recognize the necessity for expert assistance at sentencing. *See* Standard 7-9.4 (set out at App. 5a, *infra*).

[17] It is curious, to say the least, that the State's psychiatrists were unable to form any opinion about Ake's past mental condition because their examinations were limited in purpose to a determination of his present competence, but were able to form clear opinions about his future dangerousness on the basis of those same examinations.

no reply at all to the argument (Pet. Br. at 41-42) that due process minimally requires that when the prosecution relies on psychiatric testimony to establish the aggravating circumstance of future dangerousness, an indigent offender must be provided with the means to attempt to rebut that testimony in kind. For, as Judge Scalia recently noted in holding that the prosecution could constitutionally compel a defendant to submit to examination by a government psychiatrist, "[o]rdinarily the *only* effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony." *United States* v. *Byers*, 740 F.2d 1104, 1114 (D.C. Cir.) (en banc), *cert. denied*, 104 S. Ct. 717 (1984) (emphasis added). *Cf. Barefoot* v. *Estelle*, 103 S. Ct. at 3397 and n.5.

III. THE TRIAL COURT'S FAILURE TO INQUIRE INTO PETITIONER'S COMPETENCE DEPRIVED HIM OF A FAIR TRIAL

It is undisputed that the trial court made *no* inquiry into Ake's competence at the time of trial. Earlier, Ake had been found incompetent to stand trial after a judicial hearing. J.A. 11-15. Six weeks later, without further hearing or inquiry, he was presumed to be competent and ordered to stand trial while being medicated with Thorazine, simply on the strength of a letter (J.A. 16) from the State hospital. J.A. 3.

The State asserts that there "is nothing in the record or in Ake's Brief to suggest" that Ake was incompetent at the time of trial. R. Br. 56. This is willful blindness. *See* Pet. Br. 9-10. Defense counsel repeatedly called the trial court's attention to their client's inability to communicate with them, *see, e.g.*, J.A. 27, 54-55, and to his "zombie"-like state, *see* J.A. 26, Tr. 659, 661. The trial judge himself acknowledged that there was "all along a real question as to whether the man had any kind of mental capacity." Tr. 495. And the Oklahoma Court of Criminal

Appeals recognized that Ake "remained mute throughout the trial. He refused to converse with his attorneys, and stared straight ahead during both stages of the proceedings." *Ake* v. *State*, 663 P.2d at 6, J.A. 71.[18] These circumstances "created a sufficient doubt of [Ake's] competence to stand trial *to require further inquiry*." *Drope* v. *Missouri*, 420 U.S. 162, 180 (1975) (emphasis added). *Accord ABA Criminal Justice Mental Health Standards*, Standard 7-4.7, Necessity for Hearing on Competence to Stand Trial (set out at App. 4a, *infra*).

The State rests its defense of the trial court's failure to make *any* such inquiry on the hospital's letter and on Ake's counsel's pre-trial withdrawal of a motion for a jury trial on the issue of competence. R. Br. 54-56.

The hospital's letter (J.A. 16) was just boilerplate and was more than a month old by the time of trial. If Ake could improve from incompetent to competent in six weeks, it cannot be presumed conclusively that he could not again regress into incompetence in four weeks.

Nor can defense counsel's withdrawal of the motion for a jury trial on competency free the State from *its* responsibility. Both *Drope* v. *Missouri*, *supra*, and *Pate* v. *Robinson*, 383 U.S. 375 (1966), recognized that it is the *court's* obligation to inquire into a defendant's competence to stand trial if his competence appears questionable. *See Drope*, 420 U.S. at 172, 176-181; *Pate*, 383 U.S. at 384. "When a court has a 'bona fide doubt' as to the

[18] The local media, which had no particular sympathy for Ake, confirmed these characterizations, reporting after the second day of trial: "Ake has shown no emotion as he sits at the defense table looking straight ahead." *El Reno Daily Tribune*, June 25, 1980, at 12, col. 1. After the case was submitted to the jury, the same newspaper reported: "The somber Ake, who sat unmoving during the 2½ day trial, continued his blank stare as the testimony portion of the trial ended." *Id.*, June 26, 1980, at 1, col. 5. As noted above (pp. 9-10), Ake's demeanor could not have been feigned.

defendant's competence, it must *sua sponte* conduct a hearing on his competence to stand trial." *Hance* v. *Zant*, 696 F.2d 940, 948 (11th Cir.), *cert. denied*, 103 S. Ct. 3544 (1983). The courts of Oklahoma are not unaware of this responsibility. *See Beck* v. *State*, 626 P.2d 327, 329 (Okla. Crim. App. 1981). *Accord ABA Criminal Justice Mental Health Standards*, Standard 7-4.2 (set out at App. 2a, *infra*).

Defense counsel stated their reason for withdrawing the pre-trial motion for a jury trial on competency: "[Ake] has just returned from Vinita [hospital]. The State's doctors have certified him competent to stand trial." J.A. 22-23. But once trial began, counsel became aware of Ake's actual condition and brought it promptly to the court's attention. *See* J.A. 26, 27. This Court has cautioned that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope* v. *Missouri*, 420 U.S. at 181.

As mentioned earlier, the trial judge noted the existence of such circumstances on the record. Tr. 495. The court's failure to follow up with an inquiry into Ake's competence was constitutionally deficient.[19]

[19] If this Court reverses Ake's conviction and remands for a new trial on the ground that he was unconstitutionally denied psychiatric assistance, it should nevertheless consider the competency issue. Ake's competency to stand trial under medication will again be an issue in any future trial, because Ake has been maintained on psychoactive medication since his conviction, and has repeatedly been transferred back and forth between the state prison and the mental hospital. The standards applicable to a determination of competency to stand trial under psychoactive medication should be clarified. *See ABA Criminal Justice Mental Health Standards*, Standard 7-4.14, Trial of Defendants on Medication (set out at App. 5a, *infra*).

CONCLUSION

For the reasons presented above and in petitioner's main brief, the judgment of the Oklahoma Court of Criminal Appeals should be reversed, and the case remanded for a new trial.

Respectfully submitted,

ARTHUR B. SPITZER
Counsel of Record
ELIZABETH SYMONDS
American Civil Liberties Union
Fund of the National Capital Area
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076
CHARLES S. SIMS
BURT NEUBORNE
American Civil Liberties Union
Foundation, Inc.
132 West 43rd Street
New York, N.Y. 10036
DEBORAH J. STAVILLE
10 West 15th Street
New York, N.Y. 10011

Of Counsel:
WILLIAM B. ROGERS
ACLU of Oklahoma
Foundation
P.O. Box 799
Oklahoma City, OK 73101

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APPENDIX

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American Bar Association
Criminal Justice Mental Health Standards
(adopted August 7, 1984)

STANDARD 7-3.3. EVALUATIONS INITATED BY DEFENSE

(a) *Defense access to mental health or mental assistance and evaluation.* The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation. In such cases an attorney who believes that an evaluation could support a substantial legal defense should move for the appointment of a professional or professionals in an *ex parte* hearing. The court should grant the defense motion as a matter of course unless the court determines that the motion has no foundation. The court should promptly provide the prosecution with a copy of the order authorizing the evaluation. Assistance of mental health or mental retardation professionals during the sentencing process is governed by Standard 7-9.4.

(b) *Uses of disclosures.* Whenever a mental health or mental retardation professional conducts an evaluation of defendant's mental condition upon the request or motion of the defense, all disclosures made by defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege. As to that evalua-

tion only, the privilege is waived to the extent that discovery is permitted by Standard 7-3.8(b), if:

(i) Defendant gives notice pursuant to Standard 7-6.3 of an intention:

(A) to raise an issue concerning defendant's mental condition at the time of the alleged crime, and

(B) to introduce the testimony of the mental health or mental retardation professional who conducted the evaluation to support the defense claim on this issue; or,

(ii) Defendant calls another mental health or mental retardation professional as an expert witness concerning defendant's mental condition at the time of the alleged crime, and the prosecution establishes, to the court's satisfaction, that in bad faith the defendant secured evaluations by all available qualified mental health or mental retardation professionals in the area thereby depriving the prosecution of the opportunity to obtain an adequate evaluation.

This standard does not preclude a mental health or mental retardation professional from disclosing the fact that the professional evaluated a named person upon defense request.

STANDARD 7-4.2. RESPONSIBILITY FOR RAISING THE ISSUE OF INCOMPETENCE TO STAND TRIAL

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to stand trial at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should move for evaluation of defendant's competence to stand trial whenever the prose-

cutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information which has come to the prosecution's attention relative to defendant's incompetence to stand trial.

(c) Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt that the defendant is competent to stand trial and that it is not filed for purposes of delay. The motion should also set forth the specific facts which have formed the basis for the motion.

(e) In the absence of good faith doubt that the defendant is competent to stand trial it is improper for either party to move for evaluation. It is improper for either party to use the incompetence process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation or to delay the proceedings against the defendant.

(f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

STANDARD 7-4.7. NECESSITY FOR HEARING ON COMPETENCE TO STAND TRIAL

(a) In every case in which a good faith doubt of the defendant's competence to stand trial has been raised and as soon as practicable after receipt of the reports of the evaluators, the court should conduct a hearing on the issue of competence to stand trial unless all parties stipulate that no hearing is necessary and the court concurs. If the defendant has been confined for examination, the hearing should be held within [seven] days of the receipt of the report of the evaluators; if the defendant is at liberty it should be held within [thirty] days.

(b) If the parties agree on the issue of competence to stand trial or issues related to treatment or habilitation, a stipulation containing the factual basis for the agreement may be accepted by the court and the court, after review of the factual basis for the stipulation, should enter the appropriate order on the basis of the stipulation. In the absence of stipulation by the parties and concurrence by the court, a hearing on the issues should be mandatory in all cases.

(c) Trial by jury should not be required for the hearing on the issues of competence to stand trial and issues related to treatment or habilitation, provided that in those jurisdictions which authorize trial by jury for determination of issues of involuntary civil commitment, jury trial should be available to a defendant to determine issues of competence to stand trial and of involuntary confinement for treatment or habilitation to effect competence.

STANDARD 7-4.14. TRIAL OF DEFENDANTS ON MEDICATION

(a) A defendant should not be considered incompetent to stand trial because the defendant's present mental competence is dependent upon continuation of treatment or habilitation which includes medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being provided such services under professional supervision.

(b) If the defendant proceeds to trial with the aid of treatment or habilitation which may affect demeanor, either party should have the right to introduce evidence regarding the treatment or habilitation and its effects and the jury should be instructed accordingly.

STANDARD 7-9.4. ASSISTANCE OF EXPERTS DURING SENTENCING

In discharging the duties specified in Standard 18-6.3(f), defense counsel may require the assistance of mental health or mental retardation professionals to explore the availability of evidence concerning the defendant's mental condition insofar as it may be relevant to issues of mitigation or disposition. Accordingly, in appropriate cases each jurisdiction should assure that this form of assistance is available to defendants who are financially unable to obtain such assistance.